89- 1369

Supreme Court, U.S.
FILED
FEB 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER, 1989

JOHN G. SCHMIDT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN G. SCHMIDT
Petitioner, Pro Per
1290 Schmidt Lane
North Brunswick,
New Jersey 08902
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(201) 297-1547

45 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals violated the doctrine of equitable recoupment creating reversible error. The court of Appeals failed to overturn the Tax Court's decision which did not apply the $8,130.94 for the year of 1983, and $7,309.65 for the year of 1984 withheld from Schmidt's pay, against the alleged deficiency.

2. Whether the United States Court of Appeals created reversible error when it failed to afford pro se litigant an opportunity fairly and freely to amend the complaint with respect to Schmidt's real estate loss thereby causing him to lose a valid Capital Loss on a technicality ?

3A. Whether the United States Court of Appeals created reversible error by dismissing Schmidt's legal arguments concerning the income tax as frivolous, when the legal authority cited failed to adequately address the issues raised in his appeal.

3B. Whether without adequate briefing of Schmidt's legal arguments, negligence penalties should have been sustained and damages imposed? Causing reversible error.

IN THE
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TERM OCTOBER, 1989

JOHN G. SCHMIDT,

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COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals Order Affirming the decision entered on by the Third Circuit Court of Appeals.

LIST OF PARTIES

The Parties to this action are:

Petitioner:

JOHN G. SCHMIDT
1290 Schmidt Lane
North Brunswick, New Jersey
08902
(201) 297-1547

Respondent:

COMMISSIONER OF INTERNAL REVENUE

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Tax Division
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OPINION BELOW

The opinion below in the U.S. Tax Court Entered on July 13, 1989. The decision of the court was entered as Petitioner timely appealed his dismissal to the Third Circuit Court of Appeals which affirmed the Tax Court decision.

JURISDICTION

The judgement of the Third Circuit Court of Appeals was entered on November 15, 1989. A Petition For Rehearing En Banc was filed and denied. The Supreme Court's jurisdiction is invoked pursuant to 28 United States Code Section 1254 (1).

BASIS OF FEDERAL JURISDICTION

The United States Court of Appeals for the Third Circuit had jurisdiction over this case by virtue of Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C.).

STATEMENT OF CASE

This case concerns three grounds for reversible error.

#1 EQUITABLE RECOUPMENT;
Withheld taxes were not subtracted from the deficiency in the court's decision.

This error constitutes plain error because Schmidt raised the issue before the Court of Appeals in his Motion for Rehearing En Banc, and the issue was apparent from Schmidt's oral argument. The notice of deficiency for 1983 shows a deficiency of $10,262.00. The IRS conceded that $8,130.94 had been withheld from Schmidt's paycheck, R.T. 18:10-25, 19:14-16, and that "the government has no problem with Mr. Schmidt being entitled to the credit for withholding". Yet the Tax Courts DECISION states the deficiency for the year of 1983 in the amount of $8,986.00. This represents plain error because the original deficiency of $10,262.00 less the withheld taxes of $8,986.00 equals $1,276.00.

The Notice of Deficiency for the year of 1984 lists the deficiency at $17, 818.00. The court and IRS

conceded withholding taxes in the amount of $7,309.65 for the year of 1984 R.T.18:14-25, 19:10-25. The Memorandum opinion concedes that "In determining the amount of the underpayment, such amount is reduced by the amount of taxes withheld from petitioner's wages M.O. 8:9,1-12. Yet the courts DECISION states the deficiency at $15,176.00. $17,818.00 less the withheld taxes of $7,309.65 equals $10, 508.35

Thus the court's decision should have stated the deficiencies for 1983, and 1984 at $1,276.00 and $10,508.35 respectively instead of $8,986.00 and $15,176.00.

Filing the Tax Court petition within the three year statute of limitations for refunds should constitute a valid claim for refund and stay the running of the statute of limitations for the years of 1983 and 1984. The petition stated sufficiently at 5(d) that the commissioner failed to consider any credits against the alleged tax to which the petitioner was entitled. Pro se pleadings should be construed liberally.

#2 PRO SE LITIGANT HELD TO THE STANDARDS OF AN ATTORNEY;

Schmidt is a pro se litigant who through ignorance of the intricacies of the tax law pertaining to deductions has been denied reasonable deductible expenses from proven losses on a real estate transaction R.T. 36:10-25, Second Stipulation of facts #3-#13, M.O.5:22-24, 6:1-26, 7:1-8. Reversible error was committed when the Court of Appeals failed to overturn the Tax Court's decision. The Tax Court failed to provide the Pro Se litigant an opportunity fairly and freely to his amend his complaint, and the Court of Appeals erred when it failed to allow Schmidt to amend his complaint, or overturn the decision. Thus Schmidt was defeated by legal technicalities in Tax Court because of his pro se status.

#3 ERROR OF LAW;

A. The court of appeals ruled on issues of law which Schmidt did not raise, and ruled that his arguments were frivolous without adequately addressing them.

1. Schmidt argues that he is not liable for the Income Tax. The court

cites section 61 (a) (1) of the Internal Revenue Code as the statutory authority for liability, but this section does not define income, the cases cited do not support the constitutionality of that section of the code as it might relate to Schmidt.

2. Schmidt argues that his wages do not constitute income for purposes of the 16th. amendment to the United States Constitution. The court cited two cases as authority for the position that wages do constitute income. Both cases deal with profits as aside from compensation (Schmidt's argument), and both cases deal with corporations rather than individuals. The Court of Appeals committed reversible error because the cases cited in the Tax Court memorandum opinion support Schmidt's position that compensation does not constitute income. The cases cited deal with the constitutionality of the 16th. amendment and direct and indirect taxes and the rules of apportionment and uniformity, issues which Schmidt has not raised.

3. Schmidt raised the question whether he was an employee for the purposes of Section 3401(c) of the

IRS Code; and, therefore, whether the Internal Revenue Service had jurisdiction to tax the petitioner. The cases cited did not address this issue.

B. If this Court agrees that the Lower Court failed to adequately determine Schmidt's legal arguments, then the Sec. 6673 Negligence penalties should be overturned as well.

ARGUMENT

This case concerns three grounds for reversible error.

#1 EQUITABLE RECOUPMENT

Failure by the U.S. Court of Appeals to correct plain error made by the Tax Court in its decision represents reversible error. The court of appeals had the legal authority to rule in Schmidt's favor. Rule 59 (b) Mistakes; Inadvertence; Excusable neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (6) any other reason justifying relief from the operation of judgement.

Schmidt did not raise the issue of the withheld money in his opening brief because of mistake, inadvertence, and excusable neglect. Schmidt filed his brief pro se, and he suffers from poor eye sight. Schmidt corrected his error when he discovered it by placing it in the

Motion for Rehearing en Banc.

Furthermore, In Woods v. Commissioner, 91 T.C. 88 (1988), the court ruled that in determining the amount of underpayment, such amount is reduced by the amount of taxes withheld from petitioner's wages.

During trial, the Tax Court clearly conceded the withheld taxes, and the IRS agreed R.T. 18:10-25, 19:14-16. The Stipulation of Facts Pg. 2 #8 & #10 clearly shows amounts withheld from Schmidt's paycheck in 1983, and 1984. Although the memorandum decision concedes the issue of withholding taxes M.O. 8:9-12, the Tax Court Decision fails to apply the withheld money against the deficiency. This error constitutes plain error because Schmidt raised the issue before the Court of Appeals in his motion for Rehearing En Bank, and the issue was apparent from the record. The notice of deficiency for 1983 shows a deficiency of $10,262.00. The IRS conceded that $8,130.94 had been withheld from Schmidt's paycheck, R.T. 18:10-25, 19:14-16, and that "the government has no problem with Mr. Schmidt being entitled to the credit for withholding". Yet the Tax Courts DECISION states the deficiency for

the year of 1983 in the amount of $8,986.00. This represents plain error because the original deficiency of $10,262.00 less the withheld taxes of $8,986.00 equals $1,276.00.

The Notice of Deficiency for the year of 1984 lists the deficiency at $17, 818.00. The court and IRS conceded withholding taxes in the amount of $7,309.65 for the year of 1984 R.T.18:14-25, 19:10-25. The Memorandum opinion concedes that "In determining the amount of the underpayment, such amount is reduced by the amount of taxes withheld from petitioner's wages M.O. 8:9,1-12. Yet the courts DECISION states the deficiency at $15,176.00. $17,818.00 less the withheld taxes of $7,309.65 equals $10, 508.35

Thus the courts decision should have stated the deficiencies for 1983, and 1984 at $1,276.00 and $10,508.35 respectively instead of $8,986.00 and $15,176.00.

The court has created reversible error by denying the Motion for Rehearing En Bank because petitioner was pro se. In the case of Christensen v. Commissioner, 786 F 2d 1382, the court held "The supreme court has directed federal trial courts to read pro se papers

liberally" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 175,66 L. Ed. 2d 163 (1980) (per curiam); Haines v. Kerner, 3404 U.S. 519, 92 S.Ct. 594, 595, 30 L.Ed. 2d 652 (1972) (per curiam) (pro se prisoner complaint held to less stringent standards than formal pleadings drafted by lawyers"); see also Bates v. Jean, 745 F. 2d 1146, 1150 (1984); Traguth v. Zuck, 710 F. 2d 90,(2d Cir. 1983) (finding district court failed to take into account pro se status and thus failed obligation "to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training". The second circuit held that pro se litigant "should be afforded an opportunity fairly and freely to amend his complaint." Holms v. Goldin, 615 F. 2d 83, 85 (2d Cir. 1980) (per curiam) (civil rights action). While this policy of liberal reading of pro se papers developed generally in prisoner and civil rights actions, it applies as well in the tax court. In Lysek v. Commissioner, 583 F. 2d 1088, 1093 (9th Cir. 1978), while holding the Tax Court was correct in finding waiver, we emphasize the tolerance

the tax court showed in explaining tax procedures to the pro se litigant. We noted that the Tax Court "did not insist on an unreasonable degree of formality in the pleadings" but instead told taxpayers of their responsibilities "in terms clearly understandable by laymen"; thus taxpayers were not defeated by "arcane legal technicalities." Id. In Scherping v. Commissioner, 747 F. 2d 478, 480 (8th Cir. 1984), the Eighth Circuit , while finding that the Tax Court was justified in dismissing a pro se petition, nevertheless noted that such Tax Court pleadings should be liberally construed. In Becker v. Commissioner, 751 F. 2d 146 3rd Cir. 1985), the court reviewed a Tax Court determination adverse to a pro se litigant. The court reasoned that although the taxpayer bears the ultimate burden of proof, pro se pleadings are to be held to less stringent standards and are to be liberally construed. Id. at 149. The courts remand to the Tax Court was based in part on the uncertainty of the language in the pro se pleadings. Id. at 151.

The Court of Appeals created reversible error because the issue of

equitable recoupment mandates application of the withheld money to the alleged deficiency. In Bull v. U.S., 295 U.S. 261 the court held "The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into the treasury by means of the fraud of its agent. United States v. State Bank, 96 U.S. 30. While here the money was taken through mistake without the element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayers rights". Although the Bull case cited above refers to a refund lawsuit, the line of reasoning is the same, one of recoupment. While Schmidt isn't asking for the money back, he is asking for the withheld taxes to be applied to the deficiency. Schmidt is not an attorney, and his pleadings should be read liberally. since the issue of equitable recoupment presented here constitutes plain error, and was apparent from the record at the time of appeal, and when motion for rehearing En Banc was made.

Schmidt's appeal for recoupment should not be defeated on the grounds that no claim for refund was filed, because he filed his petition with

the Tax Court within three years from the date of filing the returns, Schmidt's returns were adequate returns, and Schmidt was pro se.

#2 PRO SE LITIGANT HELD TO THE STANDARDS OF AN ATTORNEY

Schmidt is a pro se litigant who through ignorance of the intricacies of the tax law pertaining to deductions has been denied reasonable deductible expenses from proven losses on a real estate transaction R.T. 36:10-25, Second Stipulation of facts #3-#13, M.O.5:22-24, 6:1-26, 7:1-8. Reversible error was committed when the Court of Appeals failed to overturn the Tax Court's decision. The Tax Court failed to provide the Pro Se litigant an opportunity fairly and freely to his amend his complaint, and the Court of Appeals also failed to allow Schmidt to amend his complaint See Holmes . Thus Schmidt was defeated by legal technicalities because of his pro se status, and the courts failure to ensure that he wasn't tripped up on the issue of the Capitol Loss, See Lysek.

Arguably, all Schmidt would have had to say at trial to get the capital loss was that he entered into

the real estate transaction for a profit (sec.165 (c)(3)). When he failed to state this the court made the outrageous determination that the only possible reason for the loss, absent a declaration by Schmidt, was theft, but since he didn't substantiate theft, he couldn't have the deduction. Schmidt was defeated by arcane technicalities, because the court could have determined that since Schmidt already had a home, that the real estate transaction was entered into for profit.

In Christensen v Commissioner 786 F. 2d 1382 (9th. Cir. 1986), the court held "The policy of allowing liberal reading of pro se pleadings is particularly appropriate in tax cases. Taxpayers, unassisted by trained attorneys, are likely to have difficulty understanding the intricacies of tax litigation and procedure. Without legal counsel, they are pitted against the expertise of the Internal Revenue Service in the Tax Court.

This is clearly what happened to Mr. Schmidt with regard to the deductibility of capital losses.

#3 ERROR OF LAW

A. This case concerns reversible

error committed by the Court of Appeals in sustaining the Tax Court Ruling that Schmidt's legal arguments concerning the Income tax were without merit. Schmidt's legal arguments asserted that he is not liable for the Income Tax. The court cites IRC section 61 (a) (1) of the Internal Revenue Code as the statutory authority for liability, but the cases cited do not support the courts position with regard to taxation of the compensation of an individual.

In Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 the court ruled that the 16th amendment does not violate the provision of the two great classes of taxes in the constitution, namely that direct taxes must be apportioned, and that indirect taxes meet the requirement of uniformity. The Brushaber case is a corporate case dealing with the taxation of dividends from corporate profits under the tax act of 1913. The court ruled that "The provisions of the statute which require collection at the source by corporations, debtors, fiduciaries and employers involve the taking of property without due process of law

and the taking of private property for public use without compensation and are invalid." This would seem to support Schmidt's position that compensation does not constitute "Income" for the purposes of the 16th. amendment of the U.S. Constitution. However, the major issues in Brushaber are not the issues raised by Schmidt, and therefore the case is not on point. The Court of Appeals failed to explain their reason for sustaining the Tax Court's Decision.

In Commissioner v. Glenshaw Glass, 348 U.S. 426, the second case cited by the Tax Court, and sustained by the Court of Appeals, the court ruled that a corporation could not escape taxation of a punitive damages award on the basis that the statutory construction of Sec. 22 (a) did not specifically name punitive damage awards. The decision raised no constitutional argument as to the sixteenth amendment, only issues of statutory construction. The decision only reinforces Mr. Schmidt's position that income is defined as a profit or a gain, because punitive damages are above and beyond compensation. Mr. Schmidt's argument

centers on his compensation in the form of wages Glenshaw deals with accessions to wealth. The court went on to make the distinction "Here we have instances of undeniable accessions to wealth, clearly recognized, and over which the taxpayer has complete dominion." Schmidt had no such dominion over his wages, because money was withheld as taxes before he got paid, and he had many bills which had to be paid out of his wages to maintain himself. Glenshaw Glass on the other hand was compensated for its losses, yet it received $324,529.94 in punitive damages, a windfall above and beyond any expenses incurred in operating. The court goes on to cite Eisner v. Macomber 252 U.S. 189, 207, defining income as "the gain derived from capital, from labor, or from both combined." This is precisely Schmidt's argument. In Eisner, "The court was there endeavoring to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder, or changed 'only the form, not the essence,' of his capital investment"

The distribution was held not to be a taxable event distinguishing

between gain and capital. In other words, the distribution was compensation, and only restored the taxpayer to status quo. Schmidt similarly argues that his wages did little more than pay his bills, and as compensation did not constitute income. Nothing in the above cases would suggest otherwise.

In General American Investors Co. Inc. v. Commissioner of Internal Revenue, 348 U.S. 434, a case concerning corporate receipt of insider profits the court states, "As in Glenshaw, the taxpayer realized the money in question free of any restrictions to use." this as stated earlier is clearly not the case with Schmidt's wages.

The court of Appeals also failed to address whether the petitioner was an employee for the purposes of Section 3401(c) of the IRS Code; and, therefore, whether the Internal Revenue Service had jurisdiction to tax the him.
Therefore it was unreasonable for the Court of Appeals to sustain the Tax Court's decision in light of its failure to address Schmidt's arguments.

B. The court created reversible

error by sustaining the section 6673 penalties against Schmidt because as outlined above in 3A., the Tax Court failed to address his arguments. Schmidt has submitted in good faith substantial evidence of his legal research efforts which either the Court of Appeals failed to read, or having read it, failed to address it.

In Scott v. Commissioner, 61 T.C. 654 (1974), the record showed that the petitioner honestly believed that they had made a contribution to an institute even though they had no equity in the property contributed. The court said that "We express no opinion as to the merits"..."for denial of deductions there was a bona fide dispute with substantial issues of law and fact which consequently prevents any imposition of additions to the tax." In a case where such clear abuse is apparent the court justified no additions to the tax. But here where Schmidt has demonstrated substantial research to sustain his position that compensation is not income, the court evidently sees the issue as a political one to be punished summarily.

CONCLUSION

Petitioner asks this court to overturn the lower courts decision for any of the following reasons, and to the extent the court deems just by...

1 Applying the withheld taxes for the years of 1983 and 1984 against the deficiencies in the Tax Court Decision, and adjusting penalties and interest to reflect the lower taxable amounts of $1,276.00 and $10,508.35 respectively.

2. Granting the deduction for the real estate loss in amounts to be established through standard accounting procedures, and adjust penalties and interest to reflect the new taxable amount owed.

3. Relieve Schmidt of the burden of taxation of the compensation which he received in 1983, and 1984, and reduce the tax liability to zero.

4. Relieve Schmidt of the section 6673 penalties for negligence, and for damages imposed by the court of appeals for any of the reasons stated above.

APPENDIX - A

UNITED STATES TAX COURT

JOHN G. SCHMIDT,	)	
	)	
Petitioner,	)	
	)	DOCKET NO.
v.	)	8370-87
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	PETITION FOR REDETERMINATION
	)	
Respondent.	)	
	)	

John G. Schmidt, hereby petitions for a redetermination of the alleged deficiency set forth by the Commissioner in his Notice of Deficiency, dated February 18, 1987 for Tax year ending 12-31-1983 and Notice of Deficiency, dated 3-02-1987 for the Tax year ending 12-31-1984, and as the basis for his case, states and alleges as follows:

1. The petitioner is John G. Schmidt with legal residence at 1290 Schmidt Lane, North Brunswick, New Jersey, 08902.

2. Notice of Deficiency was mailed to the Petitioner on February 18, 1987, and March 02, 1987, and was issued by the Office of the District Director in Newark, New Jersey, 07101. The Petitioner declines to submit a copy thereof or the exhibits annexed thereto, as to do so would be to enter evidence that the respondent is required to enter.

3. Petitioner further alleges that the allegations contained in the Notice of Deficiency are all issues which must be proved by the respondent. To submit the same would be to admit all said allegations thereby making this appeal moot.

4. The alleged deficiencies as determined by the Commissioner are for the income taxes for calendar years 1983 and 1984, in the total amount of $28,080.00, plus penalties total amount of $8,409.65, all of which is in dispute.

5. The alleged deficiency herein is based upon the following errors:

a) The Commissioner and I have erroneously and wrongfully included in gross income the amount

of $36,158.16, which is alleged to be wage income for year 1983.

b) The Commissioner and I have erroneously and wrongfully included in gross income the amount of $55,512.48, which alleged to be wage income for year 1984.

c) The Commissioner has erroneously and wrongfully included an assessment of the penalties provided for under 6653(a) IRC, 6661 IRC for the year 1983 and 1984.

d) The Commissioner erroneously and wrongfully failed to consider any credits against the alleged tax to which the Petitioner is entitled.

6. A statement of the facts upon which the Petitioner relies as the basis for his case is as follows:

a) For the period in question, the Petitioner was employed as a W-2 type worker from which he earned only wages. Such wages was the source of his labor as an equal exchange and thus no gain accrued to the Petitioner as a result of this transaction.

b) Petitioner has never willfully violated any Internal Revenue rules of regulation. Therefore, the inclusion of the penalties discussed in paragraph 5(d) above are without foundation.

c) The Petitioner has significant amounts of expenses which were incurred, Petitioner seen no need of listing. These deductions should be applied against the alleged deficiency.

d) On oath and affirmation, and under penalty of perjury, the undersigned states that he does not owe the additional tax alleged to be due by the Commissioner.

Wherefore, Petitioner respectfully requests that the Notice of Deficiency herein be dismissed and that the Commissioner be ordered to pay all of the Petitioner cost and disbursements, including refund.

Dated this 28th day of March, 1987

Petitioner
/S/ John G. Schmidt
John G. Schmidt 147-20-9745
Certified Mail P-108-758-139

UNITED STATES TAX COURT

JOHN G. SCHMIDT,	)	
	)	
Petitioner,	)	
	)	
v.	)	DOCKET NO.
	)	8370-87
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case admits, denies, and alleges as follows:

1. Admits.

2. Admits that the notice of deficiency for the taxable year ended December 31, 1983 was mailed to petitioner on February 18, 1987 and that the notice of deficiency for the taxable year ended December 31, 1984 was mailed to petitioner on March 2, 1987. Respondent submits these notices and the attachments thereto marked as exhibits 1 and 2 respectively.

3. Denies.

4. Admits, except alleges that the deficiencies in income tax and addition to tax for the taxable years 1983 and 1984 were asserted in the notices of deficiency as follows:

Year	Deficiency	Additions To Tax IRC Sec. 6661	Additions To TaxIRC Sec.6653(a)
1983	$10,262.00	$2,565.50	$513.10
1984	$17,818.00	$4,454.50	$876.55

5. (a) through (d) inclusive. Denies.

6. (a) Admits that petitioner earned wages, except denies that no gain accrued to petitioner as a result of his employment.

(b) Denies.

(c) Denies for lack of sufficient information.

(d) Denies.

7. Denies generally each and every allegation of the petition not herein before specifically admitted qualified or denied.

WHEREFORE, it is prayed that respondent's determination, as set forth in the notices of deficiency, be in all respects.

WILLIAM F. NELSON

be in all respects.

WILLIAM F. NELSON
Chief Counsel
Internal Revenue Service
By: /s/
STEVEN Z. ETTINGER
Attorney

By: /s/
ARTHUR YELLIN
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Dated: 6-2-87

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UNITED STATES TAX COURT

JOHN G. SCHMIDT,	)	
	)	
PETITIONER,	)	
	)	
v.	)	DOCKET NO.
	)	8370-87
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

DECISION

Pursuant to the opinion of the Court filed on April 26, 1989, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioner for the taxable years 1983 and 1984 in the amount of $8,986.00 and $15,176.00 respectively;

That there are additions to the tax due from the petitioner for the taxable years 1983 and 1984 under the

provisions of I.R.C. Sec. 6653 (a) (1) in the amounts of $449.30 and $758.80, respectively;

That for purposes of computing the 50 percent interest penalty pursuant to I.R.C. Sec. 6653 (a) (2) for the years 1983 and 1984 the additions to tax shall be computed on the amounts of $824.40 and $7,579.42. respectively;

That there is an addition to the tax due from the petitioner for the taxable year 1983 under the provisions of I.R.C. Sec. 6661 in the amount of $206.10; and

That there are no additions to the tax due from the petitioner under the provisions of the I.R.C. Sec. 6661 for the taxable year 1984.

/S/ Julian L. Jacobs
Judge.

Entered: Jul 13 1989

T.C. Memo. 1989-188

UNITED STATES TAX COURT

JOHN G. SCHMIDT, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET NO. 83870-87 Filed Apr 26, 1989

MEMORANDUM FINDINGS OF FACT AND OPINION

JACOBS, Judge:

.....OPINION.....

We dispose of the issue raised by the petitioner that wages do not constitute income simply by stating that they do. Section 61 (a) (1); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Brushaber v. Union Pacific Railroad, 240 U.S. 1 (1916). Hence, the entire amount of wages petitioner received in 1983 ($36,158.16) and in 1984 ($55,512.48) constitutes income....(Page 5)

We next must decide whether the petitioner is entitled to a deduction in 1983 for the loss he contends he

suffered as a result of his investment in the Florida lot. Section 165(a) allows a deduction for all uncompensated losses. However, for individual taxpayers, section 165(c) limits the loss deduction to : (1) losses incurred in a trade or business (sec. 165(c)(1)); (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business (sec. 165(c)(2)); and (3) losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from theft or casualty (sec. 165(c)(3)). Although petitioner did not specify the type of loss which gives rise to his claimed deduction, since he presented no evidence that the losses were incurred in connection with a trade or business or a transaction entered into for profit, we presume he claims such loss is deductible as a theft loss under section 165(c)(3).

Theft losses are treated as sustained during the taxable year in which the taxpayer discovers loss. Section 165(e). However, for purposes of section 165(c)(3), the determination as to whether a theft

occurred is based on the law of the state in which the loss occurred. Sperzel v. Commissioner, 52 T.C. 320, 328 (1969). Essential elements of a theft are criminal intent and illegal acts under the law of the jurisdiction where the alleged theft occurred. Johnson v. United States, 291 F. 2d. 908, 909 (8th Cir. 1961); see also Farcasanu v. Commissioner, 436 F. 2d. 146, 1491 (D.C. Cir. 1970).

The record with respect to a possible theft loss is far from satisfactory. The only evidence petitioner presented was the judgement rendered in a civil proceeding in 1981 involving Continental and a letter from the trustee in bankruptcy which addresses the possibility of recovery in 1983. Petitioner failed to identify what crime Continental committed, other than providing a general statement in the trustee's letter that petitioner was defrauded. In view of the inadequacy of the evidence, the fault for which must be borne by petitioner, we are compelled to hold that petitioner failed to prove entitlement to a theft loss in 1983.....

(Pages 5, 6, and 7)

In determining the amount of the underpayment, such amount is reduced by the amount of taxes withheld from petitioner's wages. Woods v. Commissioner, 91 T.C. 88 (1988)..... (Page 8)

On his 1984 return, petitioner identified the potential controversy, however lacking in merit, when he stated that wages do not constitute taxable income. Thus, petitioner's 1984 return did provide sufficient information to enable respondent to identify the potential controversy involved. Accordingly, we find petitioner liable for the addition to tax under section 6661 for 1983 but not liable for such addition for 1984.....(Page 12)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1614

JOHN G. SCHMIDT,

Appellant

vs.

COMMISSIONER OF INTERNAL REVENUE

On Appeal From the United States Tax Court
(Tax Court No. 8370-87)
Tax Court Judge: Honorable Julien I. Jacobs

Submitted November 1, 1989

BEFORE: STAPLETON, SCIRICA, AND GARTH,
Circuit Judges

Judgement Order

The court having considered the

contentions raised by appellant, and having concluded that this appeal is frivolous, it is

ORDERED AND ADJUDGED that the judgement of the Tax Court be and is hereby affirmed and that $100 in damages and double costs are hereby awarded to appellee pursuant to Federal Rule of Appellate Procedure 38.

By the Court,
/S/ Walter K. Stapleton
Circuit Judge

ATTEST:
/S/ Sally Mrvos
Clerk

Dated: Nov 15 1989

Double Costs, plus $100.00 damages taxed in favor of the appellee as follows:

Brief.....$29.92 x 2= $59.84
Damages.....$100.00
TOTAL.....$159.84

Certified as a true copy and issued in lieu of a formal mandate on December 29, 1989.

Test: /S/ Frances R. Matysak
Deputy Clerk, United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1614

JOHN G. SCHMIDT,

APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBURG, HUTCHINSON, SCIRICA, COWEN, NYGUAARD, AND GARTH, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

Dated: Dec 21, 1989